Thus, we discard the anodyne dichotomy of classical de facto and de jure segregation. We can find no support for the view that the Constitution should be applied antithetically to children in the north and south, or to mexican-americans *vis-a-vis* anglos simply because of the adventitious circumstance of their origin or the happenstance of locality. Time has proven the soundness of the view expressed in dissent in *Jefferson II*, which, in focusing upon de facto dicta in *Jefferson I*,[6] said:

> The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because they were born into a de facto society, while the exact same racial make-up of the school system in the 17 Southern and border states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area, also violates such constitutional rights in another area.

Jefferson II at 397.

The Board, however, conceding the existence of severe racial and ethnic separation in the Corpus Christi public schools, nevertheless maintains that another type of de facto segregation exists here, arguing that this separa-

6. *United States v. Jefferson County Board of Education*, 5 Cir. 1966, 372 F.2d 836 *(Jefferson I)*, *aff'd en banc* 1967, 380 F.2d 385 *(Jefferson II)*.

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tion is not a result of school board actions and policies but rather of housing patterns, geographic fluctuations, and other social and economic factors prevalent in the city. Moreover, it urges, even if the imbalance could be traced to Board action, it does not fall within constitutional proscription because it has not acted with a discriminatory motive or purpose.

We must also reject this type of continued meaningless use of de facto and de jure nomenclature to attempt to establish a kind of ethnic and racial separation of students in public schools that federal courts are powerless to remedy. Such attempts are confusing and unnecessary. The decision in *Brown* is the clear embodiment of the legal framework for the resolution of these important issues.

Brown prohibits segregation in public schools that is a result of state action. It requires simply the making of two distinct factual determinations to support a finding of unlawful segregation. First, a denial of equal educational opportunity must be found to exist, defined as racial or ethnic segregation. Secondly, this segregation must be the result of state action.

We need not define the quantity of state action or the severity of the segregation necessary to sustain a constitutional violation. These factual determinations are better dealt with on a case by case basis. We need only find a real and significant relationship, in terms of cause and effect, between state action and the denial of educational opportunity occasioned by the racial and ethnic separation of public school students.

We affirm the finding of the district court that action by the school district here has, in terms of cause and

effect, resulted in a severely segregated school system in Corpus Christi. We need find nothing more. Discriminatory motive and purpose, while they may reinforce a finding of effective segregation, are not necessary ingredients of constitutional violations in the field of public education. We therefore hold that the racial and ethnic segregation that exists in the Corpus Christi school system is unconstitutional—not de facto, not de jure, but unconstitutional.

In limine, we note that there is no serious challenge to the district court's finding that the mexican-americans in the Corpus Christi school system are an identifiable, ethnic-minority class entitled to the equal protection guarantee of the Fourteenth Amendment. *Hernandez v. Texas*, 1954, 347 U.S. 475, 477-78. See *Hirabayashi v. United States*, 1943, 320 U.S. 81, 100; *Yick Wo v. Hopkins*, 1885, 118 U.S. 356, 369. The Board does contend, however, that segregation of mexican-american children in Corpus Christi is not a result of Board action.

The explicit holding of *Cisneros I*, which we now affirm, was that actions and policies of the Board, had, in terms of their actual effect, either created or maintained racial and ethnic segregation in the public schools of Corpus Christi. The district court found that

> . . . [A]dministrative decision by the school board in drawing boundaries, locating new schools, building new schools and renovating old schools in the predominantly Negro and Mexican parts of town, in providing an elastic and flexible subjective, transfer system that resulted in some Anglo children being allowed to avoid the ghetto, or "corridor" schools, by bussing some students, by providing one or more optional transfer zones which resulted in Anglos be-

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> ing able to avoid Negro and Mexican-American schools, not allowing Mexican-Americans or Negroes the option of going to Anglo schools, by spending extraordinarily large sums of money which resulted in intensifying and perpetuating a segregated, dual school system, by assigning Negro and Mexican-American teachers in disparate ratios to these segregated schools, and further failing to employ a sufficient number of Negro and Mexican-American school teachers, and failing to provide a majority-to-minority transfer rule, were, regardless of all explanations and regardless of all expressions of good intentions, calculated to, and did, maintain and promote a dual school system.

Id. at 617-620. Each of these findings is clearly supported by the record. But in our view the use of the neighborhood school plan is the direct and effective cause of segregation in the schools of the city.

Here, the Board, by a rigid superimposition of a neighborhood school plan upon the historic pattern of marked residential segregation that existed in Corpus Christi equated the residential homogeny to ethnic and racial homogeny in the public school system, producing inevitable segregation. That there was an absence of state action involved in creating the city's residential patterns is of no significance. The Board imposed a neighborhood school plan, *ab initio,* upon a clear and established pattern of residential segregation in the face of an obvious and inevitable result.

We have considered the Board's claim that its neighborhood school plan was established on racially or ethnically neutral criteria and impartially administered, and is therefore not beyond the pale. This contention, that treatment

of mexican-americans the same as anglos lends a patina of non-segregated respectability to the system is, when analyzed, not as pristine as it appears. The Supreme Court made it plain in *Swann* that

> An assignment plan is not acceptable simply because it appears to be neutral; such a plan may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. 402 U.S. at 28.

The Board nevertheless argues that unlawful segregation in the constitutional sense cannot exist in the absence of actions by the Board that are intentionally designed to achieve segregation, and that such a discriminatory purpose is absent here. It iterates that in the absence of a malevolent motive, de facto and not de jure segregation exists.

While there is admittedly no catholicity of viewpoint in the Circuits on the question of intentional state action, this Court has never tempered its prohibition of school board actions that create, maintain, or foster segregation by the requirement that a discriminatory intent be shown. The underpinning of our decisions is a determination of the unlawful effect of state action upon the existence of unitary school systems. *Lee v. Macon County Board of Educ.*, 5 Cir. 1971, 448 F.2d 746, 752; *Stout v. Jefferson County Board of Educ.*, 5 Cir. 1971, 448 F.2d 403, 404, *citing Cooper v. Aaron, supra; Bush v. Orleans Parish*

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School Board, E.D. La. 1960, 190 F.Supp. 861, *aff'd sub nom. City of New Orleans v. Bush*, 1961, 333 U.S. 212; *United States v. Texas*, E.D. Texas 1971, 330 F.Supp. 235, Part II, *aff'd as modified, United States v. Texas*, 5 Cir. 1971, 447 F.2d 441. *See Wright v. City of Brighton, Ala.*, 5 Cir. 1969, 441 F.2d 447, *cert. denied* 404 U.S. 915; *Hall v. St. Helena Parish School Board*, 5 Cir. 1969, 417 F.2d 801, 807, *cert. denied* 396 U.S. 904; *Henry v. Clarksdale Municipal School District*, 5 Cir. 1969, 409 F.2d 682, 687, *cert. denied* 396 U.S. 940.

This principle has now become the law of the land. In *Wright v. Council of the City of Emporia*, 1972, ____U.S. ____ [40 U.S.L.W. 4806, June 20, 1972], the Supreme Court held that the city could not create a new school district separate from that of the surrounding county where "its effect would be to impede the process" of the court-ordered dismantling of a dual school system, *id.* at 4812, finding that under its previous decisions in *Green v. County School Board*, 1968, 391 U.S. 430, and *Monroe v. Board of Commissioners*, 1968, 391 U.S. 450, school board action must be judged "according to whether it hinders or furthers the process of school desegregation." *Id.* at 4809. Citing with approval our decisions in *Lee* and *Stout, supra*, the Court rejected the "dominant purpose" test adopted by the Fourth Circuit decision in the case, focusing rather "upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. . . . [T]his 'dominant purpose' test," said the Court, "finds no precedent in our decisions." *Id.* at 4810.

Importantly, the dissent voiced no opposition to the discarding of purpose and motivation, but objected only to

the majority's factual determination that the action of the city in creating its own school district would impede the progress of desegregation.

School cases serve to emphasize the correctness of this principle, for regardless of motive, the children that suffer from segregation suffer the same deprivation of educational opportunity that *Brown* condemns. No one would suggest that the validity of a segregation law depends upon the legislators' motives in enacting it, or that such a law is unconstitutional only when it can be ascribed to racial animus. Why then the distinction between types of school board action that produce segregation? "[T]he factor of malevolent motivation is farther from the core of invidiousness that condemns explicit racial discrimination than are the odious effects produced." *Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis,* 60 Calif. L. Rev. 275, 291 (1972).[7]

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7. Prior to the decision in *Wright v. City of Emporia, supra,* the Tenth Circuit, in *Keyes v. School District No. 1, Denver, Colo.,* 10 Cir. 1971, 445 F.2d 990, 1004-1005, *cert. granted* 1972, No. 71-507, 404 U.S. 1036, rejected our position in *Lee* and *Stout* with regard to purpose and motivation in school cases. The district court in *Keyes* ordered the desegregation of several schools in the core area of Denver, the population of which was historically predominantly black and hispano, on the ground that these schools were segregated in fact, producing an inferior educational opportunity contrary to the mandate of *Brown.* The lower court determined, however, that this segregation, unlike that in the schools of the Park Hill area of Denver which it ordered desegregated, resulted primarily from causes other than school board action, although some Board policies had unintentionally operated to exacerbate the degree of imbalance. *Keyes v. School District No. 1, Denver, Colo.,* D. Colo. 1970, 313 F.Supp. 61.

The Tenth Circuit refused to enforce the order to desegregate these core area schools, finding that a constitutional deprivation did not exist in the absence of proof that they were segregated as a result of intentional state action. We have no doubt that the view that racially or ethnically motivated state action is a necessary prerequisite to the

Next we direct our attention to the hiring and reassignment of mexican-american teachers. The district court held that the faculty and administrative staff of the system were more segregated than the schools, and used this finding as further evidence of an unlawfully segregated school system. The Board was directed to assign black and mexican-american teachers throughout the system on the same ratio of percentages they comprise of the total teacher and staff population.[8] This finding is clearly supported by the record and the court's order is necessary to bring the Board into compliance with *Singleton v. Jackson Municipal Separate School District*, 5 Cir. 1970, 419 F.2d 1211, 1218 (*en banc*), *Ellis v. Bd. of Public Instruction of Orange County*, 5 Cir. 1970, 423 F.2d 203. The requirement of percentage assignments of faculty was presaged by the decision of the Supreme Court in *United States v. Montgomery County Board of Education*, 1969, 395 U.S. 225, in which the Court held that as a goal, the ratio of white to black teachers be substantially the same in each school as the ratio of white to black teachers throughout the system. This method of faculty desegregation has been endorsed by the Court in *Swann, supra* at 19-20.

The trial judge further found, and we agree, that the Board had discriminated against mexican-americans

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establishment of a constitutional violation in the field of public education is overruled by the decision in *Wright*. The remaining issue in *Keyes* is simply a factual one relating to causation which is inapposite to the case *sub judice*. *See* Petitioner's Brief for Certiorari, *Keyes v. School District No. 1, supra, appeal docketed*, No. 71-507, October 8, 1971.

The determination that no discriminatory purpose be shown makes it unnecessary for us to consider whether the record reveals intentionally discriminatory Board action.

8. *Cisneros I*, 324 F.Supp. at 623, and n. 56 at 619-620.

by failing to employ mexican-american teachers in the system, and ordered that it move immediately to employ more.[9] In order for the dual nature of the system to be realistically dismantled, faculty composition must more truly reflect the ratio of mexican-american students to the total scholastic population of the school district. The Board therefore must continue its efforts, which we acknowledge as substantial, toward the achievement, as a goal, of a ratio of mexican-american teachers to total faculty that approaches the ratio of mexican-american students to the total student population. In *United States v. Texas Education Agency*, 5 Cir. 1972, ____F.2d ____ (*en banc*) [No. 71-2508, July 31, 1972], today decided, we pointed out, however, that "[*t*]*he school board need not, of course, lower its employment standards.* A showing of a good faith effort to find sufficient qualified Mexican-American teachers to achieve an equitable ratio, will rebut any inference of discrimination." *Id.* at ____.

We turn now briefly to the position of the United States, the invited intervenor in this case. Essentially, it argues that we are confronted with de facto segregation with "maybe something more than isolated discrimination." The intervenor contrasts this with traditional dualism where the segregation is system wide because that is what the law required, and thus the remedy had to be system wide. But here, it is suggested, the remedy should be applied only to the areas which have become segregated by Board action.

9. *Cisneros I*, 324 F.Supp. at 623, and n. 57 at 620. In 1969-70, out of 1909 teachers in the system, 80% were anglo, 17% mexican-american, and 3% black. During that year, the student enrollment in the system was 47.4% anglo, 47.2% mexican-american, and 5.4% black.

Such an approach is untenable here in view of our holding that over two-thirds of the public school students in Corpus Christi are the victims of unconstitutional ethnic and racial segregation. There is established here an overwhelming pattern of unlawful segregation that has infected the entire school system. To select other than a system-wide remedy would be to ignore system-wide discrimination and make conversion to a unitary system impossible. See *Green v. County School Board, supra.* A majority of the Court, Chief Judge Brown and Judges Wisdom, Gewin, Thornberry, Goldberg, Simpson and Ingraham, concur in this part of the opinion. Judges Bell, Ainsworth, Morgan and Roney concur in the result.

REMEDY

We turn now to the remedy fashioned by the district court. We conclude that a different approach may achieve a constitutional result without involving the conversion of the school system from a non-transportation to a transportation basis to the extent ordered by the district court.

On remand, the district court is directed to desegregate the school system on the following basis:

(1) It is the prerogative and duty of those local officials having charge of the Corpus Christi Independent School District to formulate and implement student assignment plans.

(2) Where a student assignment plan is found to be unconstitutional, as here, because of the existence of segregation which has been imposed by statute or by official act against blacks and an identifiable ethnic group (here the mexican-american students), it is the duty of the school

officials to forthwith formulate and implement such student assignment plan as will remedy the discrimination which has been found to exist. Where one race schools continue to exist, school authorities must show that such schools are not the result of present or past discrimination on their part. *Swann,* 402 U.S. at 26.

(3) In the event the school officials abdicate this responsibility or fail to remedy the discrimination forthwith, the district court is empowered to and should proceed forthwith to remedy the discrimination.

(4) Usually in rural, and in some city school districts where the population is diffused, assignment on a strict neighborhood basis has been sufficient to eliminate discrimination in student assignments. It is apparent that this will not suffice in the Corpus Christi Independent School District, although it may suffice as to some schools. To the extent that it does not suffice, the district court will proceed to employ other methods of desegregation.

(5) The pairing or clustering of schools, the realignment of school assignment zones, and the relocation of portable school rooms will be methods of eliminating segregated schools. Pairing or clustering should be of schools in close proximity. The pairing or clustering of schools in close proximity and the realignment of school zones will result merely in an expansion of the neighborhood or community school concept. Such transportation problems as may arise will thereby be minimized. Another method of eliminating segregated schools with little increase in transportation is to restructure the assignment of students already being transported.

(6) If after utilizing the procedures outlined above, proscribed segregated schools still exist, the court must

consider the pairing or clustering of schools in non-contiguous school zones. *Swann*, 402 U.S. at 28. No such pairing or clustering of non-contiguous school zones may be required until the court has exhausted every other possible remedy which would not involve increased student transportation. Whenever the court must exercise its power to pair or cluster schools located in non-contiguous zones, it must minimize student transportation requirements in such plan as is devised to pair or cluster schools located in non-contiguous zones.

The length and time of travel for students under any plan must be considered in light of the age of the children, and the risk to health and probable impingement on the educational process. *Swann*, 402 U.S. at 30-31. The material consideration in assessing the probable effect on health and the educational process as to each particular child will be the time required for transportation as distinguished from distance. Under some plans, children will be transported from their neighborhood school to the school of assignment rather than from their homes to the school of assignment. In such event, the time consumed in travel must include the time necessary to reach the neighborhood school or other point of embarkation.

In fashioning transportation plans the school board and district court must avoid invidious discrimination on the basis of race or national origin through the imposition of the burden of desegregation on one or both of the minority groups. *Lee v. Macon County Board of Education, supra* at 753-54; *Mims v. Duval County School Board*, 5 Cir. 1971, 447 F.2d 1330, 1331-32.

(7) As the Supreme Court made clear in *Swann*, the requirement of ". . . any particular degree of racial bal-

ance or mixing . . ." as a matter of substantive constitutional right would be disapproved. 402 U.S. at 24. Such racial balance as may result from the pairing or clustering or rezoning of schools is constitutionally permitted as "an interim corrective measure." *Swann,* 402 U.S. at 27.[10]

An overall amelioration of any possible discrimination will tend to be accomplished by the use of the mandatory majority to minority transfer provision of *Swann,* supra, 402 U.S. at 36-37, heretofore ordered by the district court. Such a provision will guarantee to both races an unfettered right to attend schools with members of an opposite race or identifiable ethnic group, and with transportation provided. The district court is directed to constitute a tri-ethnic committee in the school district to foster the use of the majority to minority transfer.[11] A majority of the Court, Judges Bell, Thornberry, Coleman, Ainsworth, Godbold, Morgan, Clark, Ingraham and Roney concur in this part of the opinion.

AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED.

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10. In making certain that the school system is unitary and that the discrimination has been eliminated, we have required that specified reports be filed for three years and that the case not be dismissed thereafter without giving notice to plaintiff. *Youngblood v. Board of Public Instruction of Bay County, Florida,* 5 Cir. 1971, 448 F.2d 770; *Wright v. Board of Public Instruction of Alachua County, Florida,* 5 Cir. 1971, 445 F.2d 1397. *See Swann,* 402 U.S. at 31-32 on the termination of federal court intervention in school cases.

11. The record in *Ellis v. Board of Public Instruction of Orange County, Florida,* No. 71-2696, now pending in this Court, discloses that in the 1970-71 school term, there were 2,095 transfers of black students under the majority to minority transfer provision out of a total of 15,747 black students in the system.

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GEWIN, Circuit Judge, with whom BROWN, Chief Judge, WISDOM, GOLDBERG and SIMPSON, Circuit Judges, join, concurring in part and dissenting in part:

This court today approves the district court's findings of fact and affirms its statement of the applicable law. But for reasons not stated in the opinion and certainly not apparent from the record, a majority of this court concludes that "a different approach [as to remedy] may achieve a constitutional result without involving the conversion of the school system from a non-transportation to a transportation basis to the extent ordered by the district court." I believe that today's modification-by-deletion of the district court's remedy ignores both the facts as found and the procedure followed during that court's year long effort to fashion a remedy. I therefore dissent from the "modification" of the ordered remedy.

As a member of the original panel which heard this appeal argued and as one who has painstakingly examined the record below, I fully concur with Judge Dyer's graphic and detailed description of the operation of the Corpus Christi schools and the approval of the district court's finding of school board segregation. I particularly endorse Judge Dyer's explicit abandonment of distinctions in the constitutional rights of school children based on the source or purpose of state fostered segregation.

After years of tortuous school desegregation litigation in this court reflected by hundreds of opinions in numerous volumes, the majority now stumbles and falters over issue which we have decided and laid to rest in almost every geographical area of this circuit. To realize this fact it is not necessary to cite cases; they are legion. We have dealt with practically all major school systems and many

minor ones throughout the six states over which we exercise jurisdiction. These decisions have dealt in positive and often stern fashion with the school systems of Atlanta, Savannah, Jacksonville, Miami, Jackson, Birmingham, Mobile, Montgomery, Jefferson Parish, Houston, Fort Worth and numerous others.

In most instances we were following mandates from the Supreme Court which directed us in unequivocal terms to write a decree "that promises realistically to work, and promises realistically to work *now*." Our opinions have related to all facets of desegregation and school integration including transportation, faculty and staff integration, pairing and clustering, non-curricular activities, school construction, the sale of school property, faculty ratios, hiring and firing teachers, racial protests and many others. We have not been a timid or inactive court in dealing with these problems. At times I have disagreed and have expressed my views in dissents, but the court is bound and should be bound by the long list of majority decisions we have rendered.

There is no justification for changing the rules and guidelines which we have hammered out just because the problem presented in this case relates to prohibited racial discrimination against a substantial number of Mexican-Americans and a small number of black students. I can not and will never embrace the idea that the children in Corpus Christi have different or lesser rights than the children in Jackson, Birmingham, Atlanta, New Orleans, Jacksonville and Houston, just because they are Mexican-Americans. Moreover, I continue to assert that the Constitution must be applied with equal force in all areas of the nation — North, South, East and West.

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Aside from rhetorical criticism of "bussing" the majority opinion utterly fails to demonstrate any defect in the remedy fashioned by the district court or to offer any guidance on the key substantive questions: (1) how much desegregation is required?; and (2) how much bussing is too much? The prescribed seven point "remedy" procedure essentially directs the district court to retrace its steps.

The district court ordered the school board to submit an acceptable plan (Point #2)[1] and the court then held hearings and sought the assistance of private litigants and public agencies to devise a plan of its own (Point #3).

As the majority opinion recognize, over two-thirds of the 46,000 public school students in Corpus Christi are the victims of unconstitutional ethnic and racial segregation. The majority also finds that the rigid imposition of a neighborhood school plan upon the historic pattern of marked residential segregation in Corpus Christi produced this school segregation. It is therefore absurd to believe that the use of strict neighborhood assignment (Point #4) or the pairing of close schools to expand the neighborhood or community school concept (Point #5) will significantly alleviate the existing segregation.

Even a brief examination of the district court's opinion of July 2, 1971, reveals that the court did exhaust the possibilities of zone realignment, and the pairing and clustering of schools in close proximity. The court had the benefit of the Supreme Court's opinion in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 L.Ed.2d 575 (1971) and made specific inquiry as to the effects of bussing (Point #6).

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1. These headings refer to numbers in the majority opinion under the Section entitled "Remedy."

The district judge noted that he had made no attempt to meet any certain ratio throughout the school district, but that no school should be without a substantial number of students from minority ethnic groups, and no school should be without a substantial number of Anglo students. The court found that in Corpus Christi where the Mexican-American and black students are almost one-half the student population, attendance in any school of less than 20% Anglo students or of less than 20% Mexican-American and black students (combined) would be insubstantial. The majority opinion does not object to this technique and I find no fault with a balance of "substantiality" as a constitutionally permitted 'interim corrective measure'. (Point #7).

Finally in its enigmatic decree that bussing be minimized even if after exhausting other possibilities segregated schools remain, the court is perfectly obscure on the point which will dominate the proceedings to follow below.

I believe the Supreme Court has delineated the standard with respect to transportation of students. In *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33, 28 L.Ed.2d 477 (1971) the Court rejected a desegregation plan prepared by this court because it was based on treating the western section of the county in isolation from the eastern section. The court stated:

> Like the District Court's plan, the Court of Appeals' plan was based on treating the western section in isolation from the eastern. There were unified geographic zones, *and no transportation of students for purposes of desegregation.* The reduction in the number of all-Negro schools was achieved through pairing, rezoning, and adjusting grade structures within the eastern section.
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> . . .

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> A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. See *Swann,* supra, at 22-31, 28 L.E.2d at 570-575. The measure of any desegregation plan is its effectiveness.
>
> On the record before us, it is clear that the Court of Appeals felt constrained to treat the eastern part of metropolitan Mobile in isolation from the rest of the school system, *and that inadequate consideration was given to the possible use of bus transportation and split zoning.* For these reasons, we reverse the judgment of the Court of Appeals as to the parts dealing with student assignment, and remand the case for the development of a decree "that promises realistically to work, and promises realistically to work *now.*"

402 U.S. at 36-38, 28 L.Ed.2d 580-81. Without reason or authority the majority opinion abandons the mandate of *Davis* and numerous other Supreme Court decisions.

I realize that the remedy as ordered by the district court presents serious financial and administrative difficulties. It is a very substantial matter to direct the bussing of one-third of the district's students. But I do not find it at all surprising that such a remedy might be required in a system where over two-thirds of the students attend segregated schools. The remedy ordered is the consequence of the district court's consideration of precisely those factors and priorities which this court now decrees. I would affirm the order with leave to the district court to amend the order as the practicalities of the situation require in order to avoid undue hardships or burden on the School Board.

COLEMAN, Circuit Judge, concurring in part and dissenting in part:

Given the decision on the merits as outlined in the majority opinion, I concur in the procedures discussed with reference to the appropriate remedy.

As in *United States v. Texas Education Agency*, 5 Cir., 1972, ____ F.2d ____ (en banc) [No. 71-2509, August 2, 1972] I would defer decision on the merits in this case until we shall have received the guidance of the Supreme Court which ought to come with the decision of the *Denver* case, now on the calendar of the Supreme Court.

I, therefore, dissent to deciding the *Corpus Christi* case at this time.

Seeing, however, that the case nevertheless is to be decided, I wish briefly to express some separate views of my own. This is done with considerable reluctance because when the Supreme Court speaks in the *Denver* case my observations may turn out to be legally incorrect or useless.

I am compelled to say that I am unable to agree, as a legal proposition, that the United States is a Country which is composed of "many nations within a nation". We have Americans of Mexican extraction, of Polish extraction, of Irish extraction, of many other extractions, and we have Americans who are either poor or rich. Even so, *an American is an American*, without prefix or suffix — as Mr. Sam Rayburn once said (on another subject).

The idea that there are mexican-americans, afro-americans, or any other hyphenated americans, leads either to divisions among the people or to political "power plays",

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or both. If a person is an American, that should "end it" and he ought to remember "E Pluribus Unum".

Americans of Mexican ancestry are members of the white race. Therefore, if any children of Mexican ancestry are being required to attend a school which by comparison is deficient in faculty, or curriculum, or school plant, then the school board should be mandatorily required to correct the deficiencies right where they exist. This should be done not because the children are of Mexican ancestry but because *all children* in these United States are entitled to the equal protection of the law.

This would avoid the highly artificial and necessarily unstable expedient of requiring children to spend a substantial portion of their days on buses and in strange localities.

In *Brown v. Board of Education*, 347 U.S. at 494 (1953), the Supreme Court said:

> "To separate them [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

The same effect is inevitable when children are reminded every day that they live in a community of such inferiority [so considered by those in authority] that they must be bussed out of it for an education, but condemned to remain in it at all other times. Such children will not become integral parts of the communities to which they are bussed. The real, and lasting, remedy would be to improve the housing, the schools, and the living con-

ditions where the children live. The government is equally as able to do this as it is to conduct daily upheavals in mass, via the bus.

My sympathies are with children who are faced with the lack of educational opportunity. I would not claim to cure the problem by the application of a "band-aid' of doubtful, if not harmful, value.

GOLDBERG, Circuit Judge, with whom BROWN, Chief Judge, and WISDOM, GEWIN and SIMPSON, Circuit Judges, join, concurring in part and dissenting in part:

I concur in every word and syllable of Judge Dyer's opinion of superlative excellence until the section captioned "Remedy" is reached. Discerning no error in the decree of the district court, I would affirm without qualification or equivocation.

The Board argues that the remedy fashioned by the district court is so excessive that it is erroneous. I entertain no doubt whatsoever that the methods adopted by the district court in its plan to desegregate the school system, e.g., the pairing of schools and alterations of attendance zones, are within the scope of the court's remedial powers. *Swann v. Charlotte-Mecklenburg*, 1971, U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554. But the critical factor is that the majority itself makes clear today that it entertains no such doubt. Thus, my dissent is compelled as much by confusion at what the majority has done as by disagreement with its remedy. I fail to understand why the majority would agree to the substantive requirements as set forth in Judge Dyer's fine opinion, and then remand to the district court for a remedy based on findings of fact that have already been made.

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The majority concludes that student assignment plans are initially the prerogative of the school board. So the district court held, and so we have held on a number of occasions. Yet the majority remands. The majority admits that the school board must bear the burden of proof if it wishes to maintain a system found to be unconstitutionally segregated. So the district court found. Yet the majority remands. The majority concludes that the district court must proceed to desegregate if the board fails to do so. The district court found that the board in Corpus Christi failed to desegregate to any substantive degree, and the district court then proceeded to fashion a remedy. A very able district judge requested that the school board submit a comparative plan for integrating its schools. The board refused to offer any constructive suggestions whatsoever. *Cisneros v. Corpus Christi Ind. School Dist.*, S.D. Tex. 1971, 330 F.Supp. 1377. It is astounding that the school board would then urge that this court delay implementing the district court order when the school board itself failed to advance any constructive suggestion of its own. It is even more astounding that a majority of this court now condones the board's behavior. Yet the majority remands.

The majority endorses pairing, clustering, and realignments of school zones, as indeed it must under the precedents of this court and of the Supreme Court. *See especially Brown v. Board of Education of Bessemer, Alabama*, 5 Cir. 1972, slip op. 71-2892 [July 11, 1972]. The district court paired, clustered, and realigned school zones. Yet the majority remands. The majority concludes that transportation may as a last resort be required to eliminate segregation in the Corpus Christi schools. If transportation is required, the majority intones, then the

district court must order busing. The district court found as a matter of fact that some transportation would be required in Corpus Christi. Yet the majority remands.

In short, every single finding of fact that is necessary to support the majority's substantive reasoning has already been made. Yet the majority remands. The remedy that the majority has engrafted onto the reasoning of the district court and of this court will produce no substantive changes whatsoever in the trial court's original decree—except delay. Without so much as a hint that the findings by the trial judge with regard to the remedy were erroneous, the majority cavalierly consigns the plaintiffs to another round of litigation and the school children of Corpus Christi to another round of segregated education.

> "There is a constitutional right that must be vindicated by a desegregation plan—a right possessed by the students of the district, not by the parties involved in the negotiations. If a constitutional right to attend integrated schools actually exists, there must be a way of ensuring that it is not bartered away in a trade-off for other goals or lost because of incompetence or inadvertence."

Comment, "Busing, Swann v. Charlotte-Mecklenburg, and the Future of Desegregation in the Fifth Circuit," 49 Texas L. Rev. 884, 907 (1971).

The board alleges that it will sustain a financial burden in providing any buses necessary for implementation of the court's student assignment plan. In *Swann* the Court found that bus transportation was a normal and accepted tool of educational policy. Notwithstanding the fact that the "remedy . . . may be administratively awkward, inconvenient, and even bizarre in some situations and may

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impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." *Swann v. Charlotte-Mecklenburg,* 401 U.S. at 28, 28 L.Ed.2d at 573. Busing is transportation, nothing more. If it is possible to integrate the schools of Corpus Christi without the purchase of a single bus, then that is clearly preferable. But the critical question is integration not transportation.

> "It is imperative, then, that the Nation's judicial system be able to deal efficiently with the basic concept of busing. If the judiciary does not, the future of desegregation may be endangered. . . . Whatever the wisdom of the judiciary's original involvement in desegregation, it would be tragic for the forces of equality to be frustrated, after victory in so many bloody battles, merely because the courts could not rise to the task presented them."

49 Texas L. Rev. at 910.

I doubt that the extent of busing that might be necessary under the district court's original plan has been fully explored by the majority or the school board. I think it is not unlikely that far less transportation and at less cost may be required than that which has been estimated. Because of the density of Mexican-American and black children in the "corridor" area of Corpus Christi, which is approximately in the center of the school district, there may well be a number of alternatives in rearranging boundaries that would reduce the number of children to be bused. Furthermore, during this appeal a bond issue has been approved in which $5.9 million is allocated for building, renovating, and rebuilding various schools. A number of alternatives that do not require transportation

are now available in careful site selections. All of this is not to say that the implementation of the district court's plan should be postponed or placed in limbo while other avenues finally leading to a unitary school system are explored. The school board had its chance, the district court made its findings, and both should now be concluded. Desegregation of the Corpus Christi school system is long overdue, and the plan approved by the district court should be promptly put into effect. But I suggest that with some innovation the segregated system could have been and now can be eliminated without the dire consequences that are conjured up by the school board.

Swann and its lineal ascendants and forefathers command us to be sensitive to the trial court's proximity to the problems. This reference to the trial court's localization is particularly persuasive when the trial judge himself, as here, concludes that some drastic action is required. *See* Comment, "School Desegregation after *Swann*: A Theory of Government Responsibility," 39 U.Chi.L.Rev. 421 (1972).

Admittedly the trial court performed needed major surgery in order to purge the system of ethnic prejudice and discrimination. Such surgery has heretofore been confirmed as a therapeutic necessity. I would not incise again and apply a Band-Aid to the incision, as the majority has done with its "remedy." The remand would permit and even auspicate a jejune and mild antiseptic. The ghetto line is clearly marked "Ayres Street" in Corpus Christi, and designating it as the ethnic division point, has infected the whole system. First aid to a toe and then to a finger finds no support in the Supreme Court's diagnosis and prognosis for ending segregation in schools "root and branch." I do not read *Swann* as a countermanding order

to patch up the school district and return it to action with a terminal case of the Mexican-American counterpart to Jim Crowism. *See* Comment, "Project Report: DeJure Segregation of Chicanos in Texas Schools," 7 Harv. Civ. Lib. — Civ. Rights L. Rev. 307. If the Supreme Court wanted to let roots and branches of discrimination foliate, it would have so decreed. Until its orders are clarion, I will use every effort to despoil any system that permits unconstitutional discrimination in the public schools by whatever description semantics — de facto, de jure, state action. In fact, the Supreme Court reversed one of this court's decisions in a companion case to *Swann, Davis v. Board of School Commissioners,* 1971, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577. To me this response not only vindicated the efforts that this court had made toward maximizing the integration of the school systems, but indicated that even more rigorous action on our part was called for. Yet the majority remands.

This is not the hour, this is not the day, and Corpus Christi is not the place for courts to flag in their striving for constitutional schools, for quality education, for integrated education. I am aware that the board's resources are not unlimited. If the district court finds after a plenary hearing with full findings of fact and conclusions of law that the board is unable to carry out any of the plans, then that court or this court may, of course, adjust its order accordingly. Our court must of necessity rely to a large extent on the informed judgment of the district court, the majority's actions today notwithstanding. In my judgment, however, it is also necessary to say clearly that the days of "with all deliberate speed" are gone, and gone forever. The district court plan should be implemented now, for "[t]he obligation of every school district is to

terminate dual school systems at once and to operate now and hereafter only unitary schools." *Alexander v. Holmes County,* 1969, 396 U.S. 19, 90 S.Ct. 14, 24 L.Ed.2d 41. The majority's so-called "remedy" in this case is not an abdication of our past efforts. It is a regression. "Equal protection of the laws" means equal protection, not equivocal protection.

AINSWORTH, Circuit Judge, with whom BELL and RONEY, Circuit Judges, join, concurs in the result, and in the remedy which the District Court is directed to provide on remand of this case.

GODBOLD, Circuit Judge, with whom COLEMAN, MORGAN, and CLARK, Circuit Judges, join, files the following special opinion.

For the reasons set out in the special opinion of Judge Godbold in *United States of America v. Texas Education Agency, et al.,* No. 71-2508, decided this date, we would hold this appeal in abeyance pending further action by the Supreme Court of the United States, and we dissent from consideration of the merits at this time. Directed as we are by a vote of eight judges to seven to consider the merits, we concur in only that part of the opinion of Judge Dyer headed "Remedy."

BROWN, Chief Judge, with whom WISDOM, GEWIN, THORNBERRY, GOLDBERG, DYER and SIMPSON, Circuit Judges, join:

To Judge Godbold's dissent I reiterate my response in 71-2508, *United States of America v. Texas Education Agency.*

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office Of The Clerk

Edward W. Wadsworth
Clerk

Rm. 408-400 Royal St.
New Orleans, La. 70130

August 2, 1972

Mr. V. Bailey Thomas, Clerk
U.S. District Court
P.O. Box 2567
Corpus Christi, Texas 78400

No. 71-2397-Jose Cisneros, et al v. Corpus Christi Independent School Dist. et al
(U.S. D. C. No. 68-C-95)

Dear Mr. Thomas:

Enclosed is a certified copy of an opinion-order this day entered by the court in the referenced cause which is issued as and for the mandate.

Returned herewith are three boxes and three flat packages of exhibits. The 22 Volume Record on Appeal and roll of exhibits will be returned to you shortly.
Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By: DONNA PROTTI
Deputy Clerk

/dp
cc and enc. to:

Messrs. Richard A. Hall
J.W. Gary
Messrs. Donald L. Howell
David T. Searls
Mr. Scott T. Cook
Mr. Chris Dixie
Mr. James DeAnda
Mr. Brian Landsberg
Hon. Richard G. Kleindienst
Mr. Chas. Stephen Ralston
Mr. Mario Obledo
Mr. Edward Idar, Jr.
Mr. David L. Norman
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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-649

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

JOSE CISNEROS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-649

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

JOSE CISNEROS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is set out in the Appendix to the Petition for Writ of Certiorari at pp. 119-154. The opinions of the district court are reported at 324 F. Supp. 599 and 330 F. Supp. 1377, and are set out in the Appendix at pp. 1-48 and 54-97, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on August 2, 1972 (A. 155). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

The district court herein found as a matter of fact that Mexican-American and Negro children in the Corpus Christi Independent School District had been segregated into separate schools because of their race and national origin through the actions of the School District. It held as a matter of law that these actions violated the rights of those students to the equal protection of the laws. The Court of Appeals upheld the district court's findings of fact and affirmed its holding in reliance on this Court's school desegregation decisions. Under these circumstances, is there any basis for a review of the lower court's holding by this Court?

Statement of the Case

This action was brought in 1968 in the United States District Court for the Southern District of Texas, pursuant to 42 U.S.C. § 1983, on behalf of Mexican-American and Negro parents and pupils on their own behalf and as representatives of the classes of Mexican-American and Negro pupils attending schools in the District. The case was brought to end the unconstitutional segregation of students by race and national origin in the District schools. After a lengthy trial the district court issued extensive findings of fact and conclusions of law. The court found that because of the actions of the defendant school officials both Negro and Mexican-American students had been segregated on the basis of their race and national origin from Anglo students.

On the basis of these findings, the district court required the immediate implementation of a comprehensive desegregation plan. A notice of appeal was filed by the school of-

ficials and a stay of the implementation of the plan was obtained from another district judge because of the trial judge's absence from the district. That stay was vacated by the Fifth Circuit, but was reinstated by Mr. Justice Black acting as Circuit Judge for the Fifth Circuit in an order reported at 404 U.S. 1211 (1971).

On the appeal, the Fifth Circuit, sitting *en banc,* affirmed the district court as to its findings of fact and conclusions of law, but vacated the order as it related to the desegregation plan itself and remanded for further proceedings. A cross petition seeking review by this Court of the Fifth Circuit's order requiring a new plan is pending in this Court, *sub nom., Cisneros* v. *Corpus Christi Independent School District,* Oct. Term 1972, No. 72-668.

Statement of Facts

The district court made exhaustive findings of fact, which are summarized by the Fifth Circuit in its opinion. We respectfully refer this Court to all three opinions, set out in the appendix filed with the cert. petition, and here we will merely summarize the most significant facts as found by the district court.

In sum, this case involves a fact pattern similar to that developed in a number of other school desegregation cases. That is, the school district was found to have adopted and followed a consistent policy of structuring school attendance zones, building and expanding schools, and instituting transfer policies, so as to take advantage of existing residential segregation in the City of Corpus Christi, and hiring and assigning faculty, all resulting in Anglo students attending schools separate from those attended by Mexican-American and black students.

The following are the most important findings of fact of the district court:

1. "Mexican-American students are an identifiable, ethnic-minority class" in the Southwest, Texas,[1] and in Corpus Christi (A. 13-16).

2. Those students "are now separated and segregated . . . in all three levels of the school system" (A. 17, 18-21, n. 36-37), even to a greater degree than they are segregated residentially (A. 37-38).

3. There has been an historic pattern of discrimination against Mexican-Americans in the Corpus Christi school district which contributed to their segregation in the schools (A. 21-27, n. 38-40).

4. Negro students are also segregated in the system, as are both Mexican-American and Negro faculty members (A. 27-29; 35, n. 56; 41).

5. Expert testimony established that the segregation of Mexican-American and Negro students causes them to suffer "harmful effects," including "psychological and emotional trauma, and scarring and crippling." (A. 42; 7. n. 26.)

6. The segregation in the schools was not simply the result of residential segregation. Rather:

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[1] See, United States Commission on Civil Rights, MEXICAN AMERICAN EDUCATION STUDY, Report 1: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest, April, 1971, pp. 21-38; Inter-Agency Committee on Mexican-American Affairs, El Paso, Tex., October 26-28, 1967, p. 98; Texas State Advisory Committee to the United States Commission on Civil Rights, THE CIVIL RIGHTS STATUS OF SPANISH-SPEAKING AMERICANS IN KLEBERG, NUECES, AND SAN PATRICIO COUNTIES, TEXAS (July, 1967); and the studies cited in *Mexican-Americans and the Desegregation of Schools in the Southwest*, 8 Houston Law Review, 929, 939, n. 75.

> The court is of the firm opinion that administrative decisions by the school board in drawing boundaries, locating new schools, building new schools and renovating old schools in the predominantly Negro and Mexican parts of town, in providing an elastic and flexible subjective transfer system that resulted in some Anglo children being allowed to avoid the ghetto, or "corridor" schools, by bussing some students, by providing one or more optional transfer zones which resulted in Anglos being able to avoid Negro and Mexican-American schools, not allowing Mexican-Americans or Negroes the option of going to Anglo schools, by spending extraordinarily large sums of money which resulted in intensifying and perpetuating a segregated, dual school system, by assigning Negro and Mexican-American teachers in disparate ratios to these segregated schools, and further failing to employ a sufficient number of Negro and Mexican-American school teachers, and failing to provide a majority-to-minority transfer rule, were, regardless of all explanations and regardless of all expressions of good intentions, calculated to, and did, maintain and promote a dual school system.

(A. 31-36, n. 50-57.)

7. The explanations of the defendant school officials for their adopting and following the above policies were not adequate to establish their independent validity (A. 41).

From these findings of fact, which are fully supported by the record,[2] the district court drew the following con-

[2] Throughout its opinion, the court makes reference to the exhibits and testimony introduced at trial. See, *e.g.*, A. 3-7; 7, n. 26; 17-21, n. 37; 22-26, n. 38-40; 31-36, n. 50-57. The decision describes the trial judge's exhaustive study and analysis of the evidence (A. 2), and points out the extent to which it was necessary to resolve factual disputes (A. 6-8, n. 26).

clusions of law. First, the school district was segregated in violation of the Fourteenth Amendment as to both Negro and Mexican-American students. The former had formerly been segregated pursuant to statute and that dual system was never disestablished. The latter were segregated as a result of the above described policies of the school district. Second, this segregation could not be remedied "by placing Negroes and Mexican-Americans in the same school" (A. 29). Rather, the duty was on the school district to adopt a plan that would result in a unitary system within the meaning of decisions of this Court and the Fifth Circuit.

To this end, further proceedings were held, resulting in the decision of July 2, 1971 (A. 54-97). The court required a comprehensive plan to be adopted in compliance with the standards established by this Court in *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971) (A. 76-77, 82).

Reasons Why the Writ Should Be Denied

Despite the arguments made by the petitioner school district, it is clear that the Court of Appeals and the district court both followed long-standing decisions of this Court and adhered to its most recent decisions regarding school desegregation. Thus, this case does not present any new issues of law, nor do the decisions below conflict with decisions of this Court or with those of other circuits. In essence, the quarrel of petitioners is with the findings of fact made by the district court and affirmed by the Court of Appeals. However, petitioners present no basis for this Court's holding that those fiindings are clearly erroneous. Therefore, this case does not warrant review by this Court on certiorari.

I.

The Factual Allegations Made by the Petitioners Were Resolved Against Them by the District Court, and There Is No Basis for the Review of These Findings Here.

Since a number of the legal arguments made by the school district are based on its characterization of the facts, some preliminary discussion of what was actually found by the trial court is necessary. Basically, petitioners present *their* version of the facts as though it was undisputed, and generally disregard or misstate the trial court's findings. In essence, the petition seeks to retry the facts here after having had adverse findings below. Of course, this Court does not sit as a trial court, and petitioners have simply failed to sustain their burden of demonstrating that the Court should grant review on the ground that the findings are clearly erroneous under Rule 52(a), Fed. R. Civ. Proc.

Some examples of disparities between factual assertions in the petition and the findings of the trial judge are illustrative:

1. The petition asserts that, "the record is . . . devoid of evidence of discrimination against Mexican-Americans in the community" (Petition for Writ of Certiorari, p. 8). To the contrary, the district court found that there *was* such discrimination, based that finding on extensive testimony (A. 22-26, n. 38-40), and further found that this discrimination contributed to school segregation (A. 27).

2. The petition asserts that there was "no evidence" that school boundaries were established or changed for the

purpose of segregation (Pet. 11). The district court found that decisions "in drawing boundaries" and locating and expanding schools "were . . . calculated to, and did, maintain and promote a dual system" (A. 31, 36), and gave examples (A. 31, n. 50).

3. The petition states that the record did not show "ethnic imbalance as a result of discrimination" and that the trial court did not so find (Pet. 12). The district court found that the historical pattern of discrimination contributed to segregation (A. 27), and that segregation resulted from the actions of the school board (A. 31-36).

4. The petition states that in 1969 "no school in the District had a teaching staff of more than 50% Mexican-American and only two . . . had a combined Negro-Mexican-American staff exceeding 50%" (Pet. 11). While this statement is literally true, it is misleading in light of the small percentage of Mexican-American (17.3%) and Negro (3.1%) teachers employed in the system (A. 35, n. 57). The point is, as the trial court found, that those teachers were concentrated in schools with predominantly Mexican-American and/or Negro student bodies (A. 34-35, n. 56; 41; 17-20, n. 37).[3]

5. Finally, in arguing that certiorari should be granted, it is stated that there was no evidence that isolation on the basis of national origin caused damage to Mexican-American students of the sort contemplated by *Brown* v. *Board of Education* (Pet. 20-21). To the contrary, the district

[3] For example, in Barnes Junior High, 94.03% of the pupils and 38.46% of the teachers were Mexican-American, so that the percentage of Mexican-American teachers was more than twice the percentage in the system as a whole. In Sundeen Junior High, on the other hand, 21.60% of the pupils and 3.03% of the teachers were Mexican-American (A. 18).

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court made precisely that finding, and based it on extensive testimony of an expert witness (A. 42; 7, n. 26).

In noting these disparities between the assertions of the petitioners and the findings of the district court, our intent is not to engage in this Court in a dispute over what were the facts. Our point is that the trial court found the facts in our favor (A. 49), that its findings are clearly supported by the record, and petitioners have provided no reason for this Court reviewing this case for the purpose of overturning them.

II.

The Decision of the Court of Appeals Is Fully In Accord With Decisions of This Court and Those of Other Circuits.

Essentially, the petition seeks to create a case that is appropriate for certiorari by characterizing the Fifth Circuit's opinion as being a radical departure from prevailing law. An examination of what the Court of Appeals in fact held, however, demonstrates that the court adhered in all respects to established precedent.

First, petitioners urge that the court's abandoning of the distinction between *"de jure"* and so-called *"de facto"* segregation requires review by this Court. However, it is clear that the Fifth Circuit was simply addressing itself to the contention that segregation is unconstitutional, or *"de jure,"* only if it had been mandated by statute; otherwise it is *"de facto"* and unassailable. The court was obviously correct in rejecting that position, for whatever may be thought to be the meaning of the *de-jure—de-facto* distinction, it does not rest on the presence or absence of statutorily mandated segregation.

Of course, the existence of such a statute makes the proof of state-created segregation relatively simple. But it still can be proved, as in this case, by showing that the segregation or discrimination resulted from actions of state officials acting without explicit statutory authority, just as, for example, such unconstitutional discrimination can be shown in jury discrimination cases.

Indeed, *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971), supports this conclusion in two respects. There, this Court was, of course, dealing with segregation originally imposed pursuant to statute. But the lengthy discussion of issues such as school placement, attendance zones and faculty ratios makes it clear that constitutional violations arise by school board actions that create or perpetuate segregation even in the absence of a statute. In addition, this Court addressed itself briefly to the *de facto—de jure* distinction in discussing the meaning of Title IV of the Civil Rights Act of 1964 in relation to school desegregation litigation. By describing "so-called 'de facto segregation'" as segregation "where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities" (402 U.S. at 17-18), it was made clear that segregation that was so caused violated the Fourteenth Amendment whether or not a statute mandated the action.

Thus, it is clear that all the Fifth Circuit did in its discussion of *de facto—de jure* segregation was to abandon what it believed, and rightly in our opinion, to be confusing terminology. Thus, its holding was simply that the question in a school desegregation case was whether the segregation was "unconstitutional" in the sense that it was caused by and was the result of state action, whether or not such action was under the specific command of a statute (A. 127-130). In so defining the issue, of course, the court

below followed decisions of this Court going as far back as *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

Second, petitioners argue that the holding of the court below that there is no necessity for showing that the policies of the school board were adopted with the specific intent of discriminating against Mexican-American students conflict with decisions of this Court. The holding of the Fifth Circuit, however, is wholly in accord with decisions which explicitly hold that it is unnecessary to attempt to uncover the underlying motivations of state officials in racial discrimination cases. Rather, the proper focus is on the *effect* of their actions. See, *Palmer* v. *Thompson,* 403 U.S. 217, 224-226 (1971).

Indeed, the Fifth Circuit relied upon and followed this Court's most recent pronouncement on school segregation, *Wright* v. *Council of the City of Emporia,* 407 U.S. 451 (1972). In *Wright,* this Court rejected the Fourth Circuit's holding that the purpose or motivation of a school board's action must be looked to to determine whether it violated the Constitution. The Court held:

> It is true that where an action by school authorities is motivated by a demonstrated discriminatory purpose, the existence of that purpose may add to the discriminatory effect of the action by intensifying the stigma of implied racial inferiority. . . . But as we said in *Palmer* v. *Thompson,* . . . it "is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators," and the same may be said of the choices of a school board. 407 U.S. at 461-62.

Thus, the question in any case arising under the Fourteenth Amendment is whether there has been a violation

of its mandate. Rather than trying to search the minds of state officials as to the underlying purpose or motivation of their actions, it is appropriate for a federal court to limit its inquiry to whether those actions have had the effect of denying equal protection. The district court here made precisely that inquiry and found that the policies adopted by the school board had the proscribed effect. The standard laid down by the Fifth Circuit—that the school board would be held responsible for the natural and probable results of administrative decisions made with awareness of their effect—is clearly correct.

Thus, contrary to the assertions of the petitioners, the lower court did *not* hold that the mere existence of racial or ethnic imbalance with nothing more constitutes a violation of the Fourteenth Amendment. Rather, it stated a two-pronged test; there must be found a denial of equal educational opportunity because of racial and ethnic isolation,[4] *and* "this segregation must be the result of state action" (A. 129).

In sum, the Fifth Circuit adhered to long-standing precedent established by this Court; in particular, it referred to this Court's decision in *Hernandez* v. *Texas,* 347 U.S. 475 (1954), which held that Mexican-Americans are fully protected by the equal protection clause of the Fourteenth Amendment if they are subjected to discrimination as an identifiable ethnic group.[5] Although *Hernandez* involved jury discrimination, its rationale is applicable to this case. There, as here, there was no history of exclusion of Mexican-Americans from jury duty imposed by statute,

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[4] Of course, reliance on statistical evidence to establish this first element was proper.

[5] As are other ethnic groups. See, *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *Korematsu* v. *United States,* 323 U.S. 214 (1944).

as was the case in many southern states with regard to the exclusion of blacks. There, as here, the Court looked to the objective indicia of actions of state officials to determine whether there had been a constitutional violation, and avoided the impossible task of probing their innermost motivations.

Finally, the decision below does not conflict with that of other circuits. Rather, the Courts of Appeals are in agreement that actions such as those of the Corpus Christi School District which perpetuate or result in school segregation violate the Fourteenth Amendment to the Constitution. *Davis* v. *School Dist. of Pontiac,* 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir. 1971), *cert. denied,* 404 U.S. 913 (1971); *United States* v. *School Dist. No. 151,* 286 F. Supp. 786 (N.D. Ill. 1966), *aff'd* 404 F.2d 1125 (7th Cir. 1968), 301 F. Supp. 201 (N.D. Ill. 1969), *aff'd* 432 F.2d 1147 (7th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971); *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972); *cf. Brewer* v. *School Bd. of Norfolk,* 397 F.2d 37 (4th Cir. 1968); *Clark* v. *Board of Educ. of Little Rock,* 426 F.2d 1035 (8th Cir. 1970), 449 F.2d 493 (8th Cir. 1971); *United States* v. *Board of Educ.,* 429 F.2d 1253 (10th Cir. 1970).[6]

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[6] Petitioners make a final argument—that if they are required to desegregate they must be given a "reasonable" time to do so. This seems to be little more than an attempt to resurrect "all deliberate speed," a standard abandoned by this Court in 1964. *Griffin* v. *School Board of Prince Edward,* 377 U.S. 218, 234 (1964). Of course, once a constitutional violation has been established it must be remedied immediately. *Alexander* v. *Holmes County Board of Ed.,* 396 U.S. 19 (1969). There has already been a delay of one and one-half years in the implementation of *any* plan for the district.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-649 and 72-668

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL., PETITIONERS

v.

JOSE CISNEROS, ET AL., CROSS PETITIONERS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This school desegregation class action was brought on July 22, 1968, by black and Mexican-American parents of children in the Corpus Christi Independent School District. Following an initial trial, the district court found that both blacks and Mexican-Americans were unconstitutionally segregated in the Corpus Christi schools as a result of official actions by the defendants (Pet. App. 1-52). The court of appeals denied the defendants' petition for permission to appeal the interlocutory order of the district court (Pet. App. 53).

491-668—72——1

Thereafter, various desegregation plans were submitted by the parties, and the district court held a hearing with respect to the relief to be ordered. On October 16, 1970, the district court requested the assistance of the United States Departments of Justice and Health, Education, and Welfare. The Department of Justice, pursuant to the court's request, applied for and was granted leave to intervene. After receiving a desegregation plan prepared by the Department of Health, Education, and Welfare, and objections thereto by both plaintiffs and defendants, the district court on July 2, 1971, ordered the implementation of its own plan, reflecting elements of the plans submitted by the parties, with certain alterations made by the court (Pet. App. 54–103).

The defendants appealed from the district court's judgments holding that black and Mexican-American students were unconstitutionally segregated in the Corpus Christi schools and requiring implementation of the student assignment plan set forth in the court's opinion of July 2, 1971.[1] The July 2 order was stayed pending a decision by the court of appeals (Pet. App. 104–105). On August 2, 1972, the court of appeals affirmed the finding of unconstitutional segregation but directed the district court to use a different approach in fashioning a remedy on remand (Pet. App. 119–154).

1. The district court found that the defendants had discriminated against black and Mexican-American students by gerrymandering attendance zone bound-

[1] The petitioners do not seek review in this Court of the findings regarding black students.

aries, discriminating in construction and location policies for new and existing schools, discriminating in faculty assignment policies, promoting segregation in transfer policies, and failing to take reasonable steps to promote desegregation generally (Pet. App. 31–36). The Corpus Christi school system was therefore held to be *de jure* segregated (Pet. App. 36). The court of appeals, while not disapproving the district court's findings, concluded that "the direct and effective cause of segregation in the schools" was the defendants' imposition of "a neighborhood school plan, *ab initio,* upon a clear and established pattern of residential segregation in the face of an obvious and inevitable result" (Pet. App. 131). The court of appeals also held that discriminatory intent, in the form of racially motivated state action, need not be shown to establish a violation of students' constitutional rights (Pet. App. 132–134).

The school district's petition presents questions concerning the standards for determining whether schools are *de facto* or *de jure* segregated and the extent to which discriminatory intent by school officials must be shown to support a finding that a student assignment policy is unconstitutional.[2] In our view, as ex-

[2] The petition presents five questions (Pet. 3–4), three of which concern the extent of a school district's duty to "eliminate unintended ethnic [Mexican-American] concentrations in some of the schools which result from residential and demographic patterns not effected by state action" or to abandon the neighborhood school concept in the face of such concentrations. The last two questions relate to the appropriate scope and timing of a desegregation remedy where at least some discrimi-

pressed in our brief below and our brief as *amicus curiae* in *Keyes* v. *School District No. 1, Denver, Colorado, et al.*, No. 71–507, this Term (argued October 12, 1972), specific school board actions or policies which cause or promote segregation *on account of race or national origin* must be remedied. While failure to show subjective segregative motivation by school board officials is irrelevant to the determination of unconstitutional segregation of public schools (cf. *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 462), circumstances showing their explicit consideration of race or implicit race-consciousness are of central importance. If the court below meant to direct that the inquiry should ignore the question of objective intent and focus only on the elements of state action and segregative effect,[3] its opinion would seem to prohibit racial imbalance in a neighborhood school system regardless of whether discrimination exists. We submit that such a result would be inconsistent with this Court's affirmance of *Spencer* v. *Kugler*, 326 F. Supp. 1235 (D. N.J.), affirmed, 404 U.S. 1027, and with its opinion in *Jefferson* v. *Hackney*, 406 U.S. 535, 547–549.

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natory action toward Mexican-Americans is found in a system where that ethnic group has never been segregated by statute.

[3] The majority opinion (Pet. App. 129) states that *Brown* "requires simply the making of two distinct factual determinations to support a finding of unlawful segregation. First, a denial of equal educational opportunity must be found to exist, defined as racial or ethnic segregation. Secondly, this segregation must be the result of state action."

Accordingly, if this Court agrees with the analysis suggested in our *amicus curiae* memorandum in *Keyes*, an appropriate disposition here would be to grant the petition, vacate the judgment below, and remand for further consideration in light of *Keyes*. The Court may therefore wish to defer action on the petition pending its decision in *Keyes*.

2. In addition, the court below (Pet. App. 136–137) ordered the fashioning of broad brush, system-wide desegregation relief, of the sort traditionally applied in remedying statutory dualism, as opposed to school-by-school relief based on a showing with respect to each that the segregation has been caused by intentional segregative action on the part of the school board. As we argued below, however, whether the relief appropriate in a case of statutory dualism is appropriate in a case such as this depends upon the extent of the proved discrimination.

Finally, while approving a system-wide remedy, the court of appeals concluded that a proper remedy could be achieved without increasing student transportation to the extent required by the district court (Pet. App. 137). It therefore remanded the case for the application of specified remedial guidelines (Pet. App. 137–140). The cross-petition of Cisneros presents the question whether a remand on this basis was erroneous (Cross-Pet. 2).

These issues with respect to the remedy may also be resolved by this Court in *Keyes*. The Court, therefore, may wish to postpone disposition of the present petitions pending its decision in *Keyes*.

Respectfully submitted.

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DECEMBER 1972.

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1972

No. 72 - 649

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL, *Petitioners,*

v.

JOSE CISNEROS, ET AL, *Respondents.*

Petition For Rehearing Of Order On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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In The

Supreme Court of the United States

October Term 1972

No. 72-649

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL, Petitioners,

v.

JOSE CISNEROS, ET AL, Respondents

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

This Court should reconsider and grant petitioners' Petition for Writ of Certiorari in this case and hear oral argument or remand the case to the Court of Appeals for further consideration in light of *Keyes v. School District No. 1*, No. 71-507, decided June 21, 1973, for two significant reasons not heretofore presented:

First, petitioners were and are entitled to a consideration and determination by the Fifth Circuit of the issue squarely presented to that court by petitioners' brief—whether the record contained evidence of intent to discriminate—which the court expressly declined to consider in its haste to deliver a pre-*Keyes* decision for reasons hereafter discussed; and

Second, petitioners have never been afforded an opportunity for oral presentation or explanation of their position to either appellate court which has written on the matter.

A CRITICAL ISSUE WAS PRESENTED TO BUT NOT PASSED UPON BY THE FIFTH CIRCUIT

The simple but crucial question heretofore ignored by this Court may be simply stated: Would this Court have refused to either review the opinion of the Fifth Circuit or to remand for further consideration if the Fifth Circuit had expressly held that the record contained no evidence of intent to discriminate and had nonetheless affirmed the judgment of the trial court?

One of petitioners' main points in their appeal as a matter of right to the United States Court of Appeals for the Fifth Circuit was the proposition

that the record was devoid of evidence of segregative intent. The Court of Appeals refused to consider the point based on its mistaken view (as illuminated by the subsequent decision in *Keyes*) that intent to segregate is not a "necessary ingredient of constitutional violations in the field of education." (Appendix, p. 130).

In *Keyes* this Court said:

> "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate."

What point was served in "emphasizing" the differentiating factor of intent or purpose if it was immaterial to the result? The statement was obviously not idle rhetoric. Much of this Court's decision in *Keyes* was entirely dependent on the distinction stated. The holding of the Fifth Circuit from which this petition emanates is in sharp contrast:

> "(The School District) urges, even if the imbalance could be traced to Board action, it does not fall within constitutional proscription because it has not acted with a discriminatory motive or purpose.

"We must also reject this type of continued meaningless use of de facto and de jure nomenclature to attempt to establish a kind of ethnic and racial separation of students in public schools that federal courts are powerless to remedy." (Appendix, p. 129).

* * *

"Discriminatory motive and purpose, while they may reinforce a finding of effective segregation, are not necessary ingredients of constitutional violations in the field of public education." (Appendix, p. 130).

* * *

"(The School Board) iterates that in the absence of a malevolent motive, de facto and not de jure segregation exists.

"While there is admittedly no catholicity of viewpoint in the Circuits on the question of intentional state action, this Court has never tempered its prohibition of school board actions that create, maintain, or foster segregation by the requirement that a discriminatory intent be shown." (Appendix, p. 132).

* * *

"The determination that no discriminatory purpose be shown (sic) *makes it unnecessary for us to consider whether the record reveals intentionally discriminatory Board action.*" (Appendix, p. 135, footnote 7; emphasis added).

The Fifth Circuit purported to recognize a third type of segregation, which is proscribed independent of and apart from the manner in which it came to be. The suggestion is one calculated to further confound the school districts throughout the country, or if the holding is not the law, then at least to visit a most unfortunate result on the Corpus Christi Independent School District:

"Thus, we discard the anodyne dichotomy of classical de facto and de jure segregation." (Appendix, p. 128).

* * *

"We therefore hold that the racial and ethnic segregation that exists in the Corpus Christi School system is unconstitutional —not de facto, not de jure, but unconstitutional." (Appendix p. 128).

The holding of the Court of Appeals is irreconcilable with this Court's disposition of the same issue in *Keyes*. If discriminatory purpose or intent is immaterial, as the Fifth Circuit has held, why

did this Court declare in *Keyes* that once it is established that there is intentional segregation in a segment of a school system "it is both fair and reasonable to require that the school authorities (in order to avoid district-wide desegregation requirements) bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent?"

If intent or purpose to segregate is not a necessary ingredient of unconstitutional segregation, what difference does it make whether the school authorities bear the burden which the Court has said they should? What purpose the language of this Court in *Keyes* that:

> "This is not to say, however, that the prima facie case may not be met by evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did."
>
> * * *
>
> "Thus, if respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated conditions of the core city schools."

Why rebut the prima facie case if, in the words of the Fifth Circuit, the segregation, though not "de jure" is nonetheless "unconstitutional"?

There is no legal tenet of which petitioners are aware that would entitle this Court to deny relief on the *assumption* that if the lower courts followed the declarations of this Court in *Keyes* and reviewed the record for evidence of intent, the result below would be the same. The trial judge leaned heavily on statistical information to arrive at his conclusion that there was "unconstitutional segregation." (Appendix, p. 17, footnote 36; p. 29). But his keystone conclusion was that "this segregated and dual school district" had its "real roots in the minds of men"—but not in intentionally or purposefully segregating. Absolutely not! On the contrary, it was in "the failure of the school system to anticipate and correct the imbalance that was developing". (Appendix, p. 31). Failure to anticipate and correct imbalance that is developing is a far cry from the intentional or purposeful creation of that imbalance in the first instance, as discussed in *Keyes*.

On more than one occasion this Court has remanded a matter to the Court of Appeals for a determination of issues not passed on by that court. *E.g. United States v. Ballard*, 322 U.S. 78, 64 S.Ct.

882, 88 L.Ed. 1148 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, 65 S. Ct. 235, 89 L.Ed. 187 (1944). Here the issue not passed upon by the Court of Appeals was whether there was evidence of intent or purpose to segregate. The 200,000 residents represented in this matter by the Corpus Christi Independent School District are entitled to an appellate determination — by this Court or by the Court of Appeals — as to whether the record contains evidence of intent or purpose to segregate. The question was properly preserved and petitioners will not have had their day in the appellate courts until the question has been squarely addressed and resolved.

PETITIONERS HAVE NOT BEEN BUT SHOULD BE PRESENTED AN OPPORTUNITY FOR ORAL PRESENTATION OF THE ISSUES ON APPEAL TO AT LEAST ONE APPELLATE COURT WHICH WRITES AN OPINION ON THE CASE.

At some point along the voyage of this case through the appellate channels, petitioners are entitled to an oral presentation of the issues and record evidence to the court which finally decides this case on the merits. Petitioners were never afforded such an opportunity for reasons which may have served the particular purpose of the Fifth Circuit but not of the litigants.

Oral presentation is especially important in this case, intimately involved as are the issues with the geography and growth of the City of Corpus Christi and the Corpus Christi Independent School District. The principal evidence consisted of large, ethnic distribution maps which graphically portrayed what petitioners cannot adequately describe or portray in written briefs but which are easy of presentation and understanding in oral argument. Oral presentation combined with use of the demonstrative evidence is the only means of effectively presenting the case. Such a presentation will establish two important points; first, the development of a high degree of segregation in residential areas at extreme ends of the District not caused by state action, and second, that construction of schools and student assignment as carried out by the School District was an intelligent approach to the geographic problems presented rather than the result of an intent to segregate.

Thus far, however, petitioners have not had their rightful day in the appellate courts. They have been shunted back and forth from the very beginning. The trial judge found in his partial final judgment at the conclusion of the first evidentiary hearing that there existed a basis for an interlocutory appeal to review major questions about which there was considerable doubt. (Appendix, pp. 51 - 52). The Fifth Circuit rejected the

attempted appeal. (Appendix p. 53). The trial judge thereupon ordered a desegregation plan into effect and a stay was granted. It was immediately vacated by the Fifth Circuit. (Appendix, p. 104). The action of the Fifth Circuit was only reversed by a petition to this Court. (Appendix, p. 104).

Petitioners then asked for an *en banc* hearing on the merits by the Fifth Circuit. The request was refused. (Appendix, p. 106). Accordingly, oral argument was to a three judge panel rather than to the fifteen justices who participated in the eventual, fragmented merits opinion. Petitioners were later advised that a decision on the merits would be withheld "pending a decision of the Supreme Court of the United States" — obviously *Keyes*. (Appendix, p. 117). Then, shortly before this court heard oral argument in *Keyes* and with no explanation of the two about-faces, the Fifth Circuit did write an *en banc* opinion and it wrote the opinion without awaiting the decision of the Supreme Court. Without regard to the confusion attendant to its precipitous and unannounced advent, the opinion did little by way of clearly explaining to petitioners exactly what their transgression had been. The majority opinion was written by only eight of the fifteen judges. Some joined or concurred in the first part of the opinion, some in the last, some in neither, and some still felt that the court should have done what it originally said it

would do, await the opinion in *Keyes v. School District No. 1.*

It is difficult to infer that the Fifth Circuit's decisions to write *en banc* and before *Keyes* were conceived primarily to resolve the problems of the Corpus Christi Independent School District. Given the procedural background, reasonable minds could conclude that the fragmented Fifth Circuit was moved to render an advisory opinion to the Supreme Court of the United States. Judges are human and the Fifth Circuit has long sat in consideration of the difficult progeny spawned by *Brown I* while other circuits in the northern and western states where segregation has never been mandated by state law have comfortably but firmly held, time and again, that segregation flowing from other causes than intent to segregate results in no constitutional violation. It is little wonder then — but not necessarily dispensation of justice to petitioners — that when presented with this case, the only case ever to be considered by them which did not involve statutorily required segregation, and given the knowledge that this Court would write soon on the subject, the Fifth Circuit should seize upon Corpus Christi as an unwilling and unfortunate vehicle in which to carry its views to the Supreme Court.

It was not the ideal case for the Fifth Circuit's

purpose. The bases for the trial court's conclusions were hazy at best and in some cases completely contradictory. But it was the only available opportunity. And so, with a peremptory reversal of the original denial to hear the case *en banc* and an ill-advised abandonment of the original decision to await *Keyes*, the fragmented court made Corpus Christi its unwilling and unfortunate messenger, directed to carry to this Court the view of eight of fifteen judges of the Fifth Circuit that without regard to antecedent intent, this or any other school district should be required to "desegregate" not because there was *de jure* segregation, not because there was *de facto* segregation, but because there was "*unconstitutional*" segregation.

Even had it wanted to hang its merits-opinion-hat on the peg of segregative intent, the Fifth Circuit could not have done so, nor should this Court assume automatically that the Fifth Circuit would find segregative intent if the case is remanded as it should be. The trial judge's decision is replete with comments which reveal the mistaken view that segregation from whatever cause is "unconstitutional." Although he was supposed to be questing for evidence of discriminatory intent, he castigated the School District time and again for its failure to affirmatively integrate Mexican-Americans and Anglo-Americans. He found in the failure to act affirmatively in response to a violation

not yet found to exist, conduct which he concluded was unconstitutional — a prime example of circular reasoning. As petitioners have previously pointed out, there was no duty to act affirmatively until there was found to have been a constitutional violation. The trial court leaned most heavily on statistical evidence of segregation in fact. (Appendix, p. 17, footnote 36; p. 29). But his moment of truth lay in his observation that the "segregated and dual school district" had its "real roots in the minds of men". (Appendix, p. 31). Though this language might be suggestive of intent, he dispelled the possibility of such an inference by specifically identifying the process in "the minds of men" to which he referred as "failure of the school system to anticipate and correct the imbalance that *was developing*". (Appendix p. 31). Had there been evidence of intent to segregate as opposed to mere segregation in fact, it would have been a simple matter for the court to have so found. That he did not speaks volumes to the points petitioners here urge — that there was no evidence of intent to segregate, and that the Fifth Circuit should review the question presented to and side-stepped by them to petitioners' extreme detriment.

Confronted with such a holding, the Fifth Circuit had several alternatives. It could simply hold that absent intent there was no constitutional

violation. But this would not get that court's message to this Court. Accordingly, it refused to pass on the existence *vel non* of evidence of intent and discarded the requirement of intent entirely. By so doing it created a conflict with the decisions of Courts of Appeal for northern and western circuits. It acknowledged that fact (Appendix p. 132) and Corpus Christi became the pawn.

In this Court petitioners have once again been met with a divided refusal to consider their contentions on the basis of a full-scale review. Allusion has already been made to the proposition that oral argument here would clearly demonstrate the simple truth of the District's position: that given the growth, residential patterns, continuing population shifts, and the unique geography of the city, the School District had only two alternatives. It could either treat all of its children alike, assigning them impartially to neighborhood schools with whatever segregation was unintentionally attendant thereto, or it could proclaim its Anglo- and Mexican-American children different from one another and assign them to schools by gerrymandering boundaries (which would accomplish little intermixing in many areas), transporting them past closer schools to others more distant, or by adopting some other bizarre method of student assignment.

Now this Court has decided that the District should not have the right to make an oral presentation which it was never afforded in the Court of Appeals and has concluded, five to four, that it should not have the right to a review of the evidence-of-intent issues presented to but not passed upon by either this Court or the Court of Appeals.

Petitioners sincerely believe that the law as announced by the Fifth Circuit below conflicts with this Court's language in *Keyes*. The conflict is one which is irreconcilable and unexplainable when examined in the light of the evidence upon which the Fifth Circuit refused to pass. It is the type of conflict which, in itself, has many times been held a valid basis for review here. *Egan v. City of Aurora*, 365 U.S. 514, 81 S.Ct. 684, 5 L.Ed.2d 741 (1961); *Pure Oil Co. v. Suarez*, 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed.2d 474 (1966). The oral argument which petitioners seek can and will reveal to the Court the error which has been committed.

It is doubtful that any other case of the import of this one to the 200,000 citizens of Corpus Christi has been disposed of by the federal appellate courts in like manner. Corpus Christi should not have been used as a veritable trial balloon. This Court should reconsider, grant the Petition for Writ of Certiorari, and either afford the oral

argument attendant thereto or remand the case to the Fifth Circuit for consideration in light of *Keyes v. School District No. 1* as many of the judges of both this Court and of the Court of Appeals felt should be done.

CONCLUSION

For the reasons set forth above, petitioners respectfully urge that this Petition for Rehearing be favorably ruled upon by this Court, and that their petition for Writ of Certiorari be granted, to be followed by oral argument before this Court or by a summary reversal and remand to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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RULE 58 CERTIFICATE AND CERTIFICATE OF SERVICE

I, Richard A. Hall, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay, and that the Petition for Rehearing is restricted to substantial grounds available to petitioners although not previously presented.

I further certify that on July 19, 1973, three copies of the foregoing Petition for Rehearing were served upon each party of record by depositing each set of copies in a United States Post Office, with air mail postage prepaid, properly addressed to counsel of record as follows:

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Hon. Elliot Richardson, Attorney General of the United States, United States Department of Justice, Washingon, D. C. 20530.

Hon. Erwin Griswold, Solicitor General of the United States, United States Department of Justice, Washingon, D. C. 20530.

Richard A. Hall